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Supreme Court of the United States

OCTOBER TERM, 1995

ANTONY BROWN, *et. al.*,

Petitioners,

—v.—

PRO FOOTBALL, INC. *d/b/a*
WASHINGTON REDSKINS, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF THE NATIONAL BASKETBALL ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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BRIEF OF THE NATIONAL BASKETBALL ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

The National Basketball Association ("NBA" or "League") submits this brief as *amicus curiae* in support of Respondents National Football League, *et al.* Both petitioners and respondents have provided written consent to the filing of this brief; copies of these consents are filed herewith.

INTEREST OF THE NBA

The NBA, comprised of 29 member teams, is an integrated business venture that engages in the production and marketing of

NBA Basketball. Because of the necessity of uniform terms and conditions of employment governing players in professional team sports, the NBA, for the past 30 years, has bargained as a single unit with the union representing NBA players, the National Basketball Players Association ("NBPA" or "Union"). Since the NBA and the NBPA commenced their labor relationship in 1965, they have entered into twelve consecutive collective bargaining agreements. The parties' 1988 Collective Bargaining Agreement expired by its terms on June 23, 1994.

At the outset of the 1994 negotiations, the NBPA demanded, among other things, the immediate elimination of three long-standing NBA employment terms that had been incorporated in the 1988 Agreement -- the NBA Draft, Revenue Sharing/Salary Cap System, and Right of First Refusal.[1] The NBPA expressly threatened -- as it had done in prior rounds of collective bargaining -- that if the League so much as maintained these employment terms in effect while the parties bargained toward a new agreement, the Union would organize and finance an antitrust lawsuit against the NBA seeking injunctive relief and treble damages. In light of this effort by the Union to use the antitrust laws as leverage in collective bargaining, the NBA itself filed a declaratory judgment action against the NBPA and its members seeking a declaration that the parties' dispute over terms and conditions of employment was governed exclusively by the federal labor laws, and not the antitrust

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[1] The NBA Draft is the method by which the negotiating rights to the best collegiate and other incoming players are allocated among NBA teams; the teams with the worst won-loss records generally receive the best selections. The Revenue Sharing/Salary Cap System is an overall wage system that allocates to the players as a whole an agreed-upon percentage of the League's gross revenues, and requires teams to establish their player payrolls in accordance with an agreed-upon maximum and minimum team salary. The Right of First Refusal permits a team to match an offer made to one of its current players by another team and thus to retain that player's services. *See National Basketball Ass'n v. Williams*, 45 F.3d 684, 686 (2d Cir. 1995), *petition for cert. filed*, 64 U.S.L.W. 3070 (U.S. July 24, 1995) (No. 95-137).

laws. *National Basketball Association v. Williams*, 94 Civ. 4488 (S.D.N.Y.). The NBPA and the player-class immediately filed antitrust counterclaims for injunctive relief and treble damages.

On July 18, 1994, the district court granted the declaratory relief sought by the NBA and denied the NBPA's counterclaims. The court held that "where a collective bargaining relationship exists, federal labor law applies to the disputes that arise between the bargaining parties." *Williams*, 857 F. Supp. 1069, 1074 (S.D.N.Y. 1994). The Second Circuit affirmed, concluding that the players' antitrust claim directly conflicts with "collective bargaining [as] intended by Congress. . . . What limits on [the NBA's] conduct that exist are found in the labor laws." *Williams*, 45 F.3d 684, 693 (2d Cir. 1995), *petition for cert. filed*, 64 U.S.L.W. 3070 (U.S. July 24, 1995) (No. 95-137). The Second Circuit's analysis of the interplay between the federal labor and antitrust laws was relied upon and quoted at length in the D.C. Circuit's decision below. *See* Petitioners' Appendix ("Pet. App.") 5a, 22a, 25a-28a.

The NBA's interest in this case is therefore unique and significant. In determining the nature and scope of the labor exemption to the antitrust laws and, specifically, its application to a multiemployer unit's labor law right to impose terms and conditions of employment after impasse, it is critical for the Court to decide whether the exemption also applies to the unit's maintenance of the *status quo*. Indeed, petitioners and their *amici* have correctly asserted that the "endpoint" of the labor exemption is "the most important and recurring issue" raised by this case, and have expressly urged the Court to adopt a legal standard that would overturn the decision in *Williams*. Petitioners' Brief ("Pet. Br.") at 45, 37-48; *accord, e.g.*, United States Brief ("U.S. Br.") at 9-26. Accordingly, the NBA has a clear interest in focusing on the *status quo* issue and explaining why the analysis set forth in both *Williams* and the decision below should be upheld.[2]

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[2] The NBA and the NBPA settled the labor dispute underlying the *Williams* litigation by agreeing upon the terms of a new six-year collective bargaining agreement. The parties have also

The NBA also has substantial practical experience with collective bargaining in professional sports. We can therefore assist the Court in understanding how unionized professional athletes have attempted to use antitrust litigation to gain leverage in collective bargaining, how such litigation subverts and disrupts the process for resolving labor disputes established by the federal labor laws, and why the various positions advanced by petitioners and their *amici* directly conflict with both the labor law process and the practice of multiemployer bargaining in the professional sports industry.

SUMMARY OF ARGUMENT

The question presented in this case is whether employees who have formed a union and voluntarily invoked the collective bargaining process in order to obtain the most favorable terms and conditions of employment should, at the same time, be able to use the antitrust laws to challenge employer conduct that is a fundamental part of that process and authorized by the labor laws. In answering this question in the negative, all three courts of appeal to have addressed the issue have advanced the same fundamental analysis: in the National Labor Relations Act, 29 U.S.C. § 151 *et seq.* ("NLRA"), Congress established a comprehensive and evenhanded process for the resolution of labor disputes; this process would be fatally undermined if courts, in the guise of determining antitrust "reasonableness," were allowed to intrude and outlaw employment terms or other conduct authorized by the labor laws; the business competition concerns of the Sherman Act are not directed at restraints in a labor market, especially those resulting from collective bargaining between unionized employees and a multiemployer unit;

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agreed that the pending petition for a writ of certiorari in *Williams* will be withdrawn once the language of the new collective agreement is finalized, and, with the players' consent, the Court has on several occasions extended the time for the NBA to respond to the petition in order to accommodate the parties' efforts. Based on the Court's most recent order (dated February 8, 1996), the NBA's time to respond has been extended to April 8, 1996.

accordingly, by virtue of the so-called "labor exemption," the antitrust laws have no application to "restraints on competition imposed through the collective bargaining process, so long as such restraints operate primarily in a labor market characterized by collective bargaining." Pet. App. 29a; *accord Williams*, 45 F.3d 684; *Powell v. National Football League*, 930 F.2d 1293 (8th Cir. 1989), *cert. denied*, 498 U.S. 1040 (1991). This plainly correct analysis is carefully delineated in respondent NFL's brief, which the NBA joins in full.

Petitioners and their *amici* attack the decision below, but offer no coherent analytical framework to take its place. For example, petitioners and the various players associations contend that the labor exemption is predicated solely on union consent to the challenged restraint, but then expressly concede that the antitrust laws cannot apply to a lockout, the hiring of replacement workers, or the withdrawal of benefits after impasse -- all of which are "restraints" adopted pursuant to the labor laws to which a union does *not* consent. *See* Pet. Br. at 18-30, 40; Players Associations' Brief ("PA Br.") at 15, 18-24. The government, after expressly rejecting petitioners' "consent" theory, U.S. Br. at 16, argues that antitrust courts should be free to intrude on the collective bargaining process immediately upon impasse, while at the same time acknowledging that Congress intended the labor law process to be free of exactly this kind of governmental interference. U.S. Br. at 20-21. Ultimately, neither petitioners nor their *amici* can resolve the fundamental incompatibility between an antitrust cause of action, which is intended to redress or prohibit unreasonable restraints on competition in a business market, and the labor law process, which obligates the parties to discuss -- and is intended to help them agree upon -- these self-same restraints in a labor market.

All parties agree that the Sherman Act must yield to the later-enacted NLRA if the "application of the antitrust laws affirmatively 'conflicts with' the NLRA's collective bargaining scheme." Pet. Br. at 17. But the proposals advanced by petitioners and their *amici* for termination of the labor exemption would create just such a conflict. Petitioners' claim that the exemption should terminate at expiration of the collective bargaining agreement

conflicts with the employers' labor law obligation to maintain the *status quo* until impasse. The government's claim that the exemption should terminate at impasse conflicts with the employers' continuing right to maintain the *status quo* and the parties' fundamental duty to bargain in good faith over mandatory subjects. Both arguments also conflict with the well-settled practice of multiemployer bargaining, especially in a professional sports league like the NFL or NBA where the member teams *must* establish common employment terms to produce their integrated entertainment product.

Petitioners' arguments are also based on a wholly unfounded premise: that unionized employees have an antitrust right to negotiate their salaries and other employment terms on an individual basis. As the NLRA makes clear, however, once employees have selected a union to act as their exclusive bargaining representative, those employees must negotiate their terms and conditions of employment only on a *collective* basis; thus, any right they may acquire to engage in individual salary negotiations derives solely from the labor law process. In their more candid moments, petitioners' *amici* concede the point: the purpose of player antitrust litigation is not to vindicate any underlying antitrust rights or to further antitrust policy, but to obtain additional leverage at the bargaining table. *See, e.g.,* U.S. Br. at 22. Because, as a practical matter, labor-management disputes over terms and conditions of employment must inevitably be resolved pursuant to the policy and process of the federal labor laws, such disputes raise no issue of antitrust policy at all.

Finally, petitioners' assertion that the absence of the antitrust weapon will lead to increased disruption in labor-management relations is fundamentally misconceived. The "disruptive" conduct about which petitioners complain -- strikes, lockouts, and other uses of economic force -- is both permitted and regulated by the NLRA. If Congress believed that such action warranted intervention by the federal courts, rather than continued adherence to the collective bargaining process, it would have provided such a remedy in the federal labor laws. In any case, petitioners have it exactly backwards: it is the presence, not the absence, of wasteful,

burdensome, and time-consuming antitrust litigation that has disrupted the orderly process of negotiating and resolving collective bargaining agreements in the professional sports industry.

ARGUMENT

I. ALLOWING UNIONIZED EMPLOYEES TO USE ANTITRUST LITIGATION AS A WEAPON IN COLLECTIVE BARGAINING WOULD CLEARLY CONFLICT WITH THE EVENHANDED PROCESS FOR RESOLVING LABOR DISPUTES ESTABLISHED BY CONGRESS IN THE NLRA

A. The Antitrust Laws Cannot Apply To Collective Bargaining Conduct If They Conflict With The Federal Labor Laws.

Even if the Sherman Act was intended to apply to labor market restraints or, more particularly, to multiemployer bargaining conduct (which it plainly was not, *see* NFL Brief; Pet. App. 24a-29a), the relevant inquiry in this case is whether the application of the antitrust laws to restraints imposed in a unionized labor market would conflict with the collective bargaining process established by the labor laws. This Court recognized the clear potential for such a conflict in its early labor exemption decisions when it concluded that, even with respect to restraints in a *product* market, the antitrust policy favoring free competition in business markets must occasionally give way to the labor law policy favoring collective bargaining in accordance with the NLRA. *See Local Union 189, Amalgamated Meat Cutters & Butcher Workmen v. Jewel Tea Co.*, 381 U.S. 676, 689 (1965); *id.* at 711-12 (opinion of Goldberg, J.) ("To tell the parties that they must bargain about a point but may be subject to antitrust penalties if they reach an agreement is to stultify the congressional scheme."). As both the majority and the dissent below confirmed, "[c]ourts presume that Congress implicitly intended to exempt from antitrust scrutiny those concerted activities

explicitly authorized by labor laws that are essential to collective bargaining[,]" as well as other longstanding labor activities not expressly authorized by the NLRA, such as multiemployer bargaining. Pet. App. 43a, 53a n.7 (Wald, J., dissenting).

Although petitioners apparently perceive some rhetorical advantage in framing the issue in terms of an "implied repeal," they too acknowledge that conflict is the governing test: "the [labor] exemption is justified only to the extent that 'labor policy requires,' and only when application of the antitrust laws affirmatively 'conflicts with' the NLRA's collective bargaining scheme." Pet. Br. at 17 (citing *Connell Constr. Co. v. Plumbers & Steamfitters, Local No. 100*, 421 U.S. 616, 622 (1975), and *United Mine Workers v. Pennington*, 381 U.S. 657, 666 (1965)). The government also agrees that where "there is a conflict between the labor laws and the antitrust laws such that both cannot be given full effect, . . . the antitrust laws should yield to the more specific, and later enacted, obligations of the NLRA." U.S. Br. at 16. As the Second Circuit has cogently summarized, "no one seriously contends that the antitrust laws may be used to subvert fundamental principles of our federal labor policy as set out in the National Labor Relations Act." *Wood v. National Basketball Ass'n*, 809 F.2d 954, 959 (2d Cir. 1987).

B. Application Of The Antitrust Laws At Expiration Of The Collective Bargaining Agreement Would Conflict With The Labor Laws.

Petitioners' initial position is that the antitrust laws should attach immediately upon expiration of a collective bargaining agreement for any term or condition of employment maintained in effect by the multiemployer unit. Pet. Br. at 45. This extreme argument, which finds support only in the district court's decision below, Pet. App. 72a-80a, has been rejected not only by the govern-

ment in this very case, U.S. Br. at 16, but also by every other court to address the issue.[3]

The reason is plain: under the *Katz* doctrine established by the NLRB and endorsed by this Court, employers are *required* to maintain in effect previously-bargained terms of employment following the expiration of a collective agreement, at least until the parties reach a bargaining impasse. *See NLRB v. Katz*, 369 U.S. 736, 743-43 (1962); *accord Litton Fin. Printing Div. v. NLRB*, 501 U.S. 190, 198 (1991); Pet. App. 22a n.7. "'Freezing the status quo ante after a collective agreement has expired promotes industrial peace by fostering a non-coercive atmosphere that is conducive to serious negotiations on a new contract.'" *Laborers Health & Welfare Trust Fund v. Advanced Lightweight Concrete Co.*, 484 U.S. 539, 545 n.6 (1988) (quoting opinion below). A contrary rule would destabilize the process and polarize the parties. As the district court in *Williams* stated, "[o]ne can easily imagine the howls to be heard from the Players if the Teams unilaterally terminated medical coverage for them and their families at the formal expiration of the Collective Bargaining Agreement." *Williams*, 857 F. Supp. at 1074. In short, conduct that is required by the federal labor laws cannot violate the antitrust laws.

Underlying petitioners' thoroughly-discredited argument that the antitrust laws attach at expiration (as well as their subsequent argument that the antitrust laws attach at impasse) is the theory that employee consent forms the basis for the labor exemption. But that theory is demonstrably false. As established in detail in the NFL's brief, the labor exemption does not exist to "protect employees," as petitioners contend (Pet. Br. at 18), or to protect employers; rather, it arises out of, and is designed to protect, the comprehensive and evenhanded framework for resolving collective bargaining disputes established by Congress in the federal labor

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[3] *See Williams*, 45 F.3d at 691; *Williams*, 857 F. Supp. at 1078; *Powell*, 930 F.2d at 1303; *Powell v. National Football League*, 678 F. Supp. 777, 778 (D. Minn. 1988); *Bridgeman v. National Basketball Ass'n*, 675 F. Supp. 960, 966 (D.N.J. 1987).

laws. *See* U.S. Br. at 14 (the labor exemption is "firmly grounded in the requirements of another statutory enactment, the NLRA"). It would be a bizarre result, indeed, if this carefully-crafted scheme for resolving labor disputes were to be free from antitrust interference only when a union does *not* dispute the prevailing terms and conditions of employment.

For this reason, petitioners' contention that a union can unilaterally waive an employer's *status quo* obligation has no legal basis. *See* Pet. Br. at 47. The *Katz* doctrine, like the parties' mutual obligation to bargain in good faith, is imposed by the labor laws in order to foster the *process* of collective bargaining, not the achievement of any one side's bargaining demands.[4]

Nor is petitioners' broad "consent" theory supported by *Litton Fin. Printing Div., supra*. *See* Pet. Br. at 46. Although the Court in that case did hold that a narrow group of employment terms -- in particular, arbitration, dues check-off, and no-strike clauses -- do not survive expiration of a collective agreement, it expressly reaffirmed that "most mandatory subjects of bargaining are within the *Katz* prohibition on unilateral changes." 501 U.S. at 199. Thus, petitioners' argument -- which essentially reduces to the proposition that *Litton* overruled *Katz* -- is clearly wrong.

Petitioners themselves deliver the final blow to their "consent" theory when they concede that the antitrust laws do not apply to a lockout or the hiring of replacement workers. *See* Pet. Br. at 40. Such employer conduct, of course, occurs *without* union consent and, indeed, over a union's adamant objections. Neverthe-

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[4] Petitioners' sole cited authority for the proposition that a union can waive the *status quo* obligation -- *NLRB v. Crompton-Highland Mills, Inc.*, 337 U.S. 217, 224-25 (1949) -- actually undercuts their argument. There, in affirming the NLRB's finding of an unfair labor practice, the Court confirmed that any changes in the *status quo* can only occur after *both* sides have discharged their *mutual* obligation to bargain in good faith to impasse. *Id.*

less, as petitioners, the dissent below, and numerous courts have acknowledged, lockouts and similar employer conduct are expressly authorized by the federal labor laws and are therefore not within the purview of the antitrust laws. Pet. App. 53a n.7 (citing cases). In the face of this concession, petitioners' "consent" argument can hardly be taken seriously.

C. Application Of The Antitrust Laws At Impasse Would Conflict With The Labor Laws.

Petitioners advance the alternative argument that the antitrust laws should attach no later than when the parties have reached the first impasse in negotiations. This contention fails at the outset for the reason discussed above: namely, that the labor exemption does not arise from union consent, but rather from the congressional policy favoring collective bargaining as the exclusive method for resolving labor disputes.

Petitioners' argument also presumes that impasse signals the end of the collective bargaining process and the governing authority of the labor laws. But in *Charles D. Bonanno Linen Serv., Inc. v. NLRB*, 454 U.S. 404 (1982), this Court clearly rejected that notion:

> As a recurring feature in the bargaining process, impasse is only a temporary deadlock or hiatus in negotiations "which in almost all cases is eventually broken, through either a change of mind or the application of economic force." Furthermore, an impasse may be "brought about intentionally by one or both parties as a device to further, rather than destroy, the bargaining process." Hence, "there is little warrant for regarding an impasse as a rupture of the bargaining relation which leaves the parties free to go their own ways."

Id. at 412 (quoting *Bonanno Linen*, 243 N.L.R.B. 1093, 1093-94 (1979); citations omitted); *accord, e.g., Hi-Way Billboards, Inc.*, 206

N.L.R.B. 22, 23 (1973) (impasse "is merely a momentary eddy in the flow of collective bargaining"), *enforcement denied on other grounds*, 500 F.2d 181 (5th Cir. 1974).

The labor laws and the collective bargaining process remain in full force and effect after impasse. Most importantly, the existence of an impasse does not permanently relieve either party of its statutory duty to bargain in good faith; to the contrary, that duty is only temporarily suspended at impasse, and is reactivated by "any changed condition or circumstance" -- such as a strike, lockout, change of mind, or change of economic fortune. I Patrick Hardin, *The Developing Labor Law* 697 (3d ed. 1992); *accord, e.g.*, *Retlaw Broadcasting Co.*, 1994 NLRB LEXIS 1074, *17-18 (Dec. 30, 1994) ("The bargaining process, itself, contemplates that passage of time following [an impasse] will lead one or the other party to modify its position(s) on deadlock issues, and, once that occurs, all parties are obliged to resume negotiations in a renewed effort to reach agreement on terms for a collective-bargaining contract."); *Hi-Way Billboards, Inc.*, 206 N.L.R.B. at 23 (the use of "economic pressure" usually breaks a bargaining impasse and "revives the parties' duty to bargain").

Further, the existence of an impasse does not affect either side's labor law duty to disclose relevant information. *Retlaw Broadcasting Co.*, 1994 NLRB LEXIS 1074 at *18 (citing, *e.g.*, *Whitin Machine Works*, 108 N.L.R.B. 1537, 1541, *enf'd*, 217 F.2d 593 (4th Cir. 1954), *cert. denied*, 349 U.S. 905 (1955)). Nor does an impasse allow an employer to withdraw from a multiemployer unit, *Bonanno Linen*, 454 U.S. at 412-13, or take action amounting to a withdrawal of recognition of the union's representative status, *see, e.g.*, *Newspaper Printing Corp. v. NLRB*, 625 F.2d 956, 964-65 (10th Cir. 1980), *cert. denied*, 450 U.S. 911 (1981). Finally, although the labor laws allow an employer to implement new employment terms at impasse, that right comes with an important limitation: namely, that the employer may only implement such terms as are reasonably contemplated within its pre-impasse bargaining proposals. *See Laborers Health & Welfare Trust Fund*, 484 U.S. at 543 n.5; *American Ship Bldg. Co. v. NLRB*, 380 U.S. 300, 316 (1965). In short, there is simply no basis for treating impasse as

anything other than a lawful intermediate stage of the collective bargaining process that will eventually give way to a resolution of the parties' labor dispute.[5]

Application of the antitrust laws at impasse would also provide powerful incentives for employees to manufacture a stalemate in negotiations, in derogation of their obligation to bargain in good faith. The existence of such incentives was one reason that the Court in *Bonanno Linen* rejected the argument that the existence of an impasse warranted an employer's withdrawal from a multi-employer bargaining unit. *See Bonanno Linen*, 454 U.S. at 412 n.8 (accepting the NLRB's explanation that if withdrawal were allowed at impasse, "parties could precipitate an impasse in order to escape any agreement less favorable than the one expected").

This is no theoretical concern. On June 15, 1994, the NBPA notified the NBA that, in the Union's view, the parties had reached a bargaining "impasse" in their efforts to negotiate a successor to the 1988 Collective Bargaining Agreement. Such an impasse existed, asserted the Union, notwithstanding the facts that (i) the parties had by then held only *two* bargaining sessions (totaling five hours of negotiations) toward a new agreement, (ii) the parties had addressed only a few of the numerous open issues between them, and (iii) the 1988 Agreement was not even set to expire until June 23, 1994. By adopting the position that negotiations had broken down, the Union was clearly attempting to put itself in a position to assert -- under either *Bridgeman v. National Basketball Ass'n*, 675 F. Supp. 960, 967 (D.N.J. 1987) (erroneously holding that the labor exemption terminates when the employer no longer has a "reasonable belief" that the challenged practice will be agreed

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[5] The dissent below seems clearly to have missed this point. *See* Pet. App. 34a, 52a, 60a (describing impasse variously as the point when "bargaining has irretrievably stalled," when the employer "has been relieved of his statutory duty to bargain" and "when an agreement is no longer in sight or even being sought"). This fundamental error underlies the dissent's determination that the antitrust laws should attach at impasse. *Id.* at 52a.

upon by the union) or the district court's decision below, Pet. App. 80a (erroneously adopting impasse as an alternative standard) -- that various employment terms contained in the 1988 Agreement would now "'be subject to successful challenge under the antitrust laws.'" *Williams*, 857 F. Supp. at 1072 (quoting NBPA position paper delivered on April 7, 1994). Because an impasse standard would encourage unions to pursue antitrust litigation, rather than collective bargaining, it would conflict with the labor law process established in the NLRA.[6]

An impasse standard would also be completely unworkable. As petitioners concede, a determination of impasse is a complex factual inquiry often enveloped in "uncertainty and legal limbo." Pet. Br. at 45; *see Taft Broadcasting Co.*, 163 N.L.R.B. 475, 478 (1967) (enumerating factors in evaluating impasse), *enf'd sub nom. American Fed'n of Television & Radio Artists v. NLRB*, 395 F.2d 622 (1968). Neither the collective bargaining process, nor the antitrust laws, would be served by a test that requires the parties to guess precisely when the legal landscape will fundamentally change. These same infirmities are present in the government's proposed standard, under which the antitrust laws would begin to apply after the employer has been advised by counsel that a bargaining impasse exists and afforded sufficient time to "eliminate any previously immunized restraint." U.S. Br. at 24. Given the transitory and ephemeral nature of a bargaining impasse, counsel is in no better position than management to identify the precise point at which this event occurs and treble damage liability may begin to accrue. The government's impasse standard would also raise substantial problems of proof, including serious issues of attorney-client privilege.

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[6] The union representing NFL players engaged in a similar stratagem when it announced an impasse in negotiations with the NFL only one business day after the district court in *Powell* erroneously held that the antitrust laws attach at impasse. *See Powell*, 930 F.2d at 1296.

At bottom, there is no consistent rationale underlying an impasse standard. Petitioners acknowledge as much when they concede that certain post-impasse conduct authorized by the labor laws -- such as a lockout or the hiring of replacement workers -- would still remain subject to the labor exemption. Pet. Br. at 40. Thus, for an employer like the NBA that simply maintains the *status quo*, the same conduct that was legal on one day could become instantly illegal the next. Indeed, because "[i]t is possible, in fact, that impasse could occur more than once within the course of a single labor dispute," U.S. Br. at 24, an employer's post-impasse maintenance of a wage scale, for example, could (under petitioners' theory) become potentially illegal, then legal, then potentially illegal again. Such a result would not only conflict with the congressional policy favoring collective bargaining, it would simply make no sense.[7]

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[7] Nor is the impasse standard rendered any more coherent by the unsupported distinction between bargaining "terms" and "tactics" suggested by the dissent below. Pet. App. 50a. If an employer is satisfied with the *status quo* -- for example, a wage scale that has not kept up with the cost of living -- its post-impasse decision to maintain that employment term in effect could equally well be a "tool[] to put pressure on the other bargaining party to reach agreement" (the dissent's definition of an immunized bargaining "tactic") or "simply the way the employer decides to run his business in the absence of any bargaining agreement" (the dissent's definition of a non-immunized bargaining "term") -- or both. *Id.* at 54a. The same is true of the employer's decision to implement a minimal wage increase that it had proposed prior to impasse. Nevertheless, the dissent concluded that an employer "can maintain the status quo" after impasse without fear of antitrust attack, but cannot similarly implement new employment terms. Pet. App. 58a. Again, such a standard simply makes no sense. *See also* NFL Brief (demonstrating that post-impasse implementation is fully authorized by the labor laws and, in any case, clearly considered to be an economic pressure tactic).

D. Application of the Antitrust Laws To Labor Market Restraints Would Conflict With Multiemployer Bargaining, Particularly Multiemployer Bargaining In Professional Sports

There is "no doubt whatsoever," as the opinion below makes clear, that petitioners' antitrust claim would fail if asserted against a single employer. Pet. App. 25a. Petitioners did not contest the point below, *id.*, and neither they nor their *amici* do so here. Thus, "the heart of the Players' position appears to be that the presence of a multiemployer bargaining unit should make a difference under the antitrust law." *Id.* It clearly does not. As this Court's decisions reflect, *see NLRB v. Truck Drivers Local Union No. 449*, 353 U.S. 87, 94-96 (1957) ("*Buffalo Linen*"); *Bonanno Linen*, 454 U.S. at 409-10, nn.3-4, and the majority concluded below, Pet. App. 25a-29a (quoting from the Second Circuit's opinion in *Williams*), Congress did not intend that multiemployer bargaining units be afforded any fewer rights under the labor laws than those available to a single employer. There is simply no basis for petitioner's contrary conclusion.[8]

The conflict between petitioners' antitrust claims and multiemployer bargaining is especially acute in the professional sports industry, where multiemployer bargaining is compulsory in nature. As the Second Circuit held in *Williams*, "sports leagues are an exception to the principle of voluntariness" that typically underlies multiemployer bargaining. 45 F.3d at 692. A professional sports league like the NBA, for example, must be able to ensure through collective bargaining that its teams play the same number

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[8] We do not detail here the numerous and substantial benefits afforded to both management and labor by the process of multi-employer bargaining. These benefits are discussed at length in both the Court's prior opinions and the opinion below (cited in text), and further elaborated in other *amicus* filings made on behalf of the NFL.

of regular season games; it must equally be able to prohibit varying agreements between individual teams and their player-employees concerning when those games will be played (*e.g.*, an agreement that games will not be played at night) or where they will be played (*e.g.*, an agreement that games will only be played in warm weather cities). Further, because the NBA's product is athletic competition, it is essential that the League and its players agree on uniform employment terms -- such as the size of team rosters, the NBA Draft, the Salary Cap, and free agency rules -- designed to equalize each team's ability to compete through the acquisition and retention of player talent. Varying agreements between individual teams and their player-employees on these and similar matters would destroy the NBA's ability to produce its integrated and competitively balanced entertainment product.[9]

Petitioners' argument is therefore not supported by the assertion that, after expiration of a collective agreement or at impasse, individual member teams of a professional sports league could avoid multiemployer bargaining and independently negotiate interim agreements with their player-employees. Pet. Br. at 40. Indeed, the Fifth Circuit concluded that the member teams of a professional soccer league were a "joint employer" and therefore *required* to engage in collective bargaining as a unit. *See North Am. Soccer League v. NLRB*, 613 F.2d 1379, 1383 (5th Cir.), *cert.*

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[9] That the members of a professional sports league must act cooperatively in order to have any product to sell has been confirmed by this and other courts. *See, e.g., NCAA v. Board of Regents*, 468 U.S. 85, 101 (1984) ("league sports" is "[p]erhaps the leading example" of a business activity that "can only be carried out jointly"); *Reynolds v. National Football League*, 584 F.2d 280, 287 (8th Cir. 1978) ("Some leveling and balancing rules appear necessary to keep the various teams on a competitive basis, without which public interest in any sport quickly fades."); *Chicago Prof. Sports Ltd. Partnership v. NBA*, 874 F. Supp. 844, 849 (N.D. Ill. 1995) ("Mutual agreement is *necessary* to create the 'product' of competitive basketball games and to insure its quality.") (emphasis added).

denied, 449 U.S. 899 (1980). The NLRB reached a similar conclusion with respect to the NFL, finding that its teams "constitute a single employer for bargaining purposes." *National Football League Management Council*, 203 N.L.R.B. 958, 961 (1973), *rev'd on other grounds, National Football League Players Ass'n v. NLRB*, 503 F.2d 12 (8th Cir. 1974). Thus, petitioners' antitrust claims simply cannot be squared with the manner in which the collective bargaining process has operated and must operate in professional sports.[10]

II. THIS CASE AND OTHER PLAYER ANTITRUST LITIGATION SERVES NO UNDERLYING ANTITRUST INTEREST, BUT IS SIMPLY INTENDED TO INCREASE THE PLAYERS' LEVERAGE IN COLLECTIVE BARGAINING

Petitioners contend that their antitrust attack on the NFL's wage scale promotes the goals of the Sherman Act by "preserving" for unionized professional athletes an "antitrust right" to negotiate their salaries on an individual basis. Pet. Br. at 23-27. No such right exists. As the NFL demonstrates in its brief, the antitrust laws were not intended to address restraints operating solely in a labor market, particularly those produced in collective bargaining between a union and a multiemployer bargaining unit.

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[10] The fact that all NBA teams *must* bargain collectively also supports the view that the League is a single economic enterprise incapable of conspiring under Section 1 of the Sherman Act. *See, e.g., Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984) (rejecting intra-enterprise conspiracy doctrine); *National Football League v. North Am. Soccer League*, 459 U.S. 1074, 1077 (1982) (Rehnquist, J., dissenting from denial of *certiorari*) (the NFL is not "offering the individual goods of many sellers, but is a separate seller offering its [product]"). We recognize that the single enterprise issue (which would provide a complete defense to the antitrust claims asserted in this case) has not been presented here and thus is not appropriate for the Court to address in this case.

Moreover, the NLRA makes clear that unionized employees may negotiate their wages only on terms established through *collective bargaining*. *See* 29 U.S.C. § 158(d) (collective bargaining over wages is "the mutual obligation of the employer and the representative of the employees"); § 159(a) ("wages" are a mandatory subject of collective bargaining). This Court has so confirmed on at least two occasions, holding that the NLRA "extinguishes the individual employee's power to order his own relations with his employer and creates a power vested in the chosen representative to act in the interests of all employees." *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 180 (1967); *accord J.I. Case Co. v. NLRB*, 321 U.S. 332, 338 (1944). Unionized professional athletes are allowed to negotiate their own salaries *only* in those instances where the union *and* the employer have so agreed as part of a *collective* bargaining agreement. Thus, for example, the collective agreement between the NBA and the NBPA provides that "notwithstanding" the NBPA's status as the exclusive bargaining representative of all NBA players, such players "may, on an individual basis, bargain with respect to and agree upon Player contracts, but only as and to the extent permitted by this Agreement." In short, the "individual bargaining" that petitioners seek in this lawsuit is "not an exercise of a right to free competition under the antitrust laws; rather, it is an exercise of a right derived from collective bargaining itself." *Caldwell v. American Basketball Ass'n*, 66 F.3d 523, 528 (2d Cir. 1995), *petition for cert. filed*, 64 U.S.L.W. 3439 (U.S. Dec. 20, 1995) (No. 95-1012).

Antitrust litigation of the kind pursued by professional athletes does not and cannot vindicate any policy underlying the Sherman Act. To the contrary, the labor disputes at the heart of such cases can only be resolved pursuant to the collective bargaining process. Thus, for example, the players' antitrust attack on the NBA Draft, Revenue Sharing/Salary Cap System, and Right of First Refusal in *Williams* was eventually resolved by the parties' agreement to a new 1995 Collective Bargaining Agreement (containing a modified version of all three employment "restraints"). The same result occurred in 1987, when the NBPA represented to the district court in *Bridgeman* that it would "never again agree" to the NBA

Draft, Salary Cap, and Right of First Refusal, but then eventually agreed to modified versions of these very employment terms in the 1988 Collective Bargaining Agreement. *See Williams*, 857 F. Supp. at 1072 (recounting collective bargaining history). Indeed, even if a mandatory subject of collective bargaining (such as a wage scale) were condemned by a court as an illegal "restraint of trade," the parties would still be obligated under the labor laws to engage in good faith negotiations about that term and, as the government recognizes, U.S. Br. at 22, could eventually agree to include it in their next collective bargaining agreement. In this case, for example, the salaries to be paid to members of Developmental Squads are now determined in accordance with the 1993 NFL-NFLPA Collective Bargaining Agreement.

The sole purpose of player antitrust litigation is to create leverage at the bargaining table. As the NBPA candidly acknowledged in its brief to the Second Circuit in *Williams*:

> [R]egardless of the outcome of litigation, some collective bargain will eventually be reached; no one believes that either the owners or the player will permanently choose to forego their mutually dependent business opportunities. Thus, allowing employees to pursue their Sherman Act claims will likely alter the substance of the collective bargain . . . .

NBPA Br. in *Williams*, at 27-28; *accord* U.S. Br. at 22. This fact puts the lie to petitioners' antitrust theory: the quest for additional leverage at the bargaining table simply cannot be squared with the congressional policy favoring "free competition in business markets" underlying the antitrust laws.

III. THE NBA'S EXPERIENCE IN COLLECTIVE BARGAINING ESTABLISHES THAT THE EXISTENCE OF PLAYER ANTITRUST LITIGATION, NOT ITS ABSENCE, UNDERMINES THE LABOR LAW PROCESS

Petitioners and their *amici* argue that player antitrust litigation has had a salutary effect on the collective bargaining process in professional sports, and that the exclusion of such lawsuits will lead to increased "disruption" and "dislocation" in labor-management relations in the future. Pet. Br. at 43-44; PA Br. at 4-18. That contention is utterly meritless.

First, the conduct about which petitioners complain -- strikes, lockouts, and other uses of economic force -- is both permitted and regulated by the federal labor laws. *See, e.g.*, *NLRB v. Washington Aluminum Co.*, 370 U.S. 9, 14 (1962) (union's right to strike); *American Ship Building Co.*, 380 U.S. at 310-11 (employer's right to lock out or to implement new employment terms at impasse). As this Court has confirmed, "[t]he presence of economic weapons in reserve, and their actual exercise on occasion by the parties, is part and parcel of the system that the Wagner and Taft-Hartley Acts have recognized." *NLRB v. Insurance Agents Int'l Union*, 361 U.S. 477, 489 (1960); *accord First Nat'l Maintenance Corp. v. NLRB*, 452 U.S. 666, 678 (1981) (noting Congress' "belief that collective discussions backed by the parties' economic weapons will result in decisions that are better for both management and labor and for society as a whole"). If petitioners are dissatisfied with the rights and remedies made available to labor and management in the collective bargaining process, their arguments should be made to Congress and not to federal antitrust courts.

Second, an accurate recitation of the history of collective bargaining in professional sports demonstrates that it is the presence, not the absence, of antitrust litigation that has disrupted the parties' efforts to resolve their disputes -- as they eventually must -- in accordance with the labor laws. In the latest round of collective bargaining in the NBA, for example, serious negotiations

toward a multi-year agreement to succeed the parties' 1988 Collective Bargaining Agreement did not take place until December 7, 1994 -- more than five months after the 1988 Agreement expired on June 23, 1994, and fully eight months after the parties held their first formal bargaining session on April 7, 1994. Rather than engaging in collective bargaining during this period, the parties' efforts were solely devoted toward antitrust threats and litigation. In particular:

1. In April and May of 1994, the players threatened to sue the League if it merely continued in effect the NBA Draft, Salary Cap, and Right of First Refusal after the expiration of the 1988 Agreement. *See Williams*, 857 F. Supp. at 1072.

2. In a June 15, 1994 letter, the NBPA predictably announced that the parties were at impasse, notwithstanding the fact that they had held only five hours of talks in two formal bargaining sessions. *See id.* at 1072-73.

3. On June 17, 1994, and in order to protect itself against the NBPA's antitrust threats, the NBA commenced the *Williams* action; ten days later, the NBPA and its members counterclaimed for injunctive relief and treble damages.

4. Over the next three weeks, the parties were involved in intense litigation: first, the players' request for a temporary restraining order prohibiting the signing of any further NBA player contracts (granted on June 28, 1994); then the players' motion for a preliminary injunction (heard and deferred on July 8, 1994); and finally an expedited trial on the merits (held July 12, 1994). *See Williams*, 45 F.3d at 686.

5. On July 18, 1994, the district court issued its decision in favor of the NBA. *Id.* Immediately

> thereafter, the NBA invited the NBPA to resume collective bargaining. The Union refused, stating in an August 3, 1994 memorandum to its members that "we do not expect to have any bargaining sessions with the League until the [Second Circuit] decides our appeal."
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> 6. In late October 1994, with the scheduled start of the 1994-95 NBA season only weeks away, the NBPA agreed to discuss -- and the parties eventually entered into -- a one-year extension (with some modifications) of their 1988 Agreement. As a result of these discussions, the parties commenced bargaining toward a new multi-year agreement on December 7, 1994.

This was not the first time that efforts to negotiate a new NBA-NBPA collective bargaining agreement had been sidetracked by antitrust litigation. In 1987, serious negotiations toward a new agreement commenced only after a district court rejected the NBPA's claim that the League's maintenance of the *status quo* was subject to antitrust scrutiny. *See Bridgeman*, 675 F. Supp. at 967. As early as 1976, and again in 1982, the Union initially refused to bargain over certain disputed employment terms on the ground that they were antitrust violations.[11]

In each of these instances, the players' antitrust claims served only to distract the parties, poison their relationship, and delay the inevitable commencement of full-scale bargaining toward a new collective agreement. These and similar player lawsuits have

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[11] Following the 1976 incident, the NLRB issued an Advice Memorandum concluding that each of the matters about which the NBA sought to negotiate (including, for example, the NBA Draft) was a mandatory subject of collective bargaining and that the NBPA's refusal to bargain over them would constitute an unfair labor practice. *National Basketball Players Ass'n*, 4 Adv. Mem. Rep. ¶ 10,037 (Jan. 26, 1976).

also had the effect of draining scarce judicial resources, a particularly unfortunate result in light of Congress' clear contemplation "that neither the courts nor the National Labor Relations Board would intervene on a case-by-case basis to adjust the parties' relative bargaining power, but rather [would] leave them to fight it out at the bargaining table." Pet. App. 46a (Wald, J., dissenting).

Finally, petitioners' predictions as to the "disruptive" effect of the decision below are equally erroneous. Labor-management relations in the NBA again prove the point. By June 14, 1995, the date on which the parties' one-year extension of the 1988 Collective Bargaining Agreement was set to expire, both the Second Circuit in *Williams* and the D.C. Circuit in this case had issued their decisions. Thus, on or after that date, the NBA could have manufactured a bargaining "impasse" (as the dissent suggested would occur, Pet. App. 47a n.6) and implemented new employment terms without fear of antitrust liability. But rather than following this course, the NBA agreed upon a brief extension of the parties' one-year agreement in order to facilitate further negotiations. As a result of this extension and virtually round-the-clock negotiations, representatives of the NBA and the NBPA were able to reach a new six-year collective bargaining agreement on June 21, 1995. The next day, the membership of the NBPA refused to ratify the pact, an act that (under the circumstances) clearly signaled a bargaining impasse. Again, however, the NBA did not implement the provisions of the June 21 agreement, but instead commenced a lockout of NBA players on July 1. This action -- which petitioners concede is outside the scope of the antitrust laws, Pet. Br. at 40 -- had the effect of shutting down the NBA's business and thus putting pressure on both sides to reach a new deal. After several further concessions by the NBA, an agreement was reached on August 8, 1995 and subsequently ratified.

It is therefore clear that the decision below will not "destabilize" labor-management relations or provide management with "additional" economic weapons. To the contrary, that decision simply leaves the parties where they were before, with the full range of rights and remedies made available to them by the federal labor laws. This collective bargaining process, and not anti-

trust litigation, is what Congress intended for the resolution of labor-management disputes when it passed the NLRA.

CONCLUSION

For the foregoing reasons, as well as those set forth in respondent NFL's brief, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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